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Date: March 23, 2001

Case No.: **2000-LHC-0940**

OWCP No.: **02-124211**

In the Matter of:

JOSE GALLEGOS,
Claimant,

v.

ZACHARY PARSONS SUNDT, et al,
Employer,

and

ACE USA,
Carrier.

Representation: Timothy Quinn, Esq.
For the Claimant

Keith L. Flicker, Esq.
For the Employer/Carrier

Before: RICHARD K. MALAMPHY
Administrative Law Judge

DECISION AND ORDER ESTABLISHING AVERAGE WEEKLY WAGE

This proceeding arises from a claim filed under the Defense Base Act Extension of the Longshore and Harbor Workers' Compensation Act ("the Act"), as amended, 33 U.S.C. § 901 et seq.

On September 27, 2000, a formal hearing was held in Denver, Colorado. The parties presented evidence and arguments at the hearing held by the undersigned, and as provided by the Act and the applicable regulations. Both parties submitted pre- and post-hearing briefs in this matter.

Although Mr. Gallegos (hereinafter Claimant) submitted a reply to Zachary Parsons Sundt's (hereinafter Employer) post-hearing brief on November 20, 2000, the Court rejects the submission because the briefing schedule did not include the submission of reply briefs. The findings and conclusions that follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

Issue[1]

What was Claimant's average weekly wage at the time of his August 6, 1998 injury?

Findings of Fact

Claimant, a welder and iron worker, started work at Zachary Parsons Sundt on June 16, 1998. (Tr. at 15.) From August 6, 1996 through October 7, 1997, Claimant worked as an iron worker for Rocky Mountain Steel Erectors where he earned twenty-three dollars an hour based on his union package. (Tr. at 24, 34.) He worked a steady forty hour work week at $17.15 per hour. (Tr. at 37.) On April 21, 1997, Claimant sustained a work-related injury while employed by Rocky Mountain Steel Erectors. (Tr. at 25.) He received temporary total disability for that injury from October 8, 1997 through April 6, 1998. (Ex. A-93, Ex. B.) On April 7, 1998, he returned to full-duty work at Rocky Mountain Erectors. (Tr. at 25, 34-35.) He worked for Rocky Mountain Erectors through June 15, 1998, after which date he started work in Moscow for Zachary Parsons Sundt. (Tr. at 35.)

Claimant applied for work at Zachary Parsons Sundt in 1997. (Tr. at 26.) He signed a one year employment contract to work as an iron worker in Moscow. (Ex. A-47, A-48; Cx. 4.) According to the terms of the contract, Employer paid Claimant at a rate of $20.40 per hour. (Cx. 4-1.) After the successful

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[1]The following abbreviations will be used as citations to the record:

Ex.- Employer's exhibits.

Cx.- Claimant's exhibits.

Tr.- Transcript of hearing held on September 27, 2000 before Administrative Law Judge Richard K. Malamphy.

completion of twelve months of employment, Claimant would be entitled to take vacation, which he earned at the rate of one day per calendar month. (Cx. 4-12.) Moreover, after four months of work, Employer agreed to provide rest and recreation leave in the amount of seven days with two additional travel days. (Cx. 4-12.) Claimant testified that he never received any money from Employer for vacation pay. (Tr. at 44-45.)

On June 16, 1998, Claimant began work for Employer. Claimant's employment with Zachary Parsons did not differ from his former employment with Rocky Mountain Erectors. (Tr. at 26.) In both cases, he handled structural work, which included welding and iron work. (Tr. at 26.) However, in his position at Zachary Parsons, Claimant worked longer weeks, sixty hours a week, six days a week, and earned $20.40 per hour. (Tr. at 27, Ex. A-49.)

Claimant worked for Employer from June 16, 1998 until September 24, 1998. (Tr. at 32.) On August 6, 1998, Claimant sustained a work-related head injury. (Ex. A-52, A-54.) Three days after his injury, Claimant returned to light duty employment as an iron worker at Zachary Parsons Sundt. (Tr. at 32-33, 35.) "Light duty" involved welding at ground level. (Tr. at 36; Ex. A-57.) He worked for approximately seven weeks after the injury until September 24, 1998. (Tr. at 35.) During that period, Claimant received his pre-injury wage of $20.40/hour for sixty hours a week. (Tr. at 36.) After continued problems with balance and his eyesight, Claimant stopped working on September 24th and returned to the United States for medical treatment. (Tr. at 33, 36; Ex. A-57.) Claimant has not worked since September 24, 1998. (Tr. at 36.) He currently receives temporary total disability as a result of his injury. (Tr. at 29.)

Discussion

The Act provides three methods for computing Claimant's average weekly wage. The first method, found in Section 10(a) of the Act, applies to an employee who worked "in the employment in which he was working at the time of injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury." 33 U.S.C. § 910(a). Section 10(a) aims at a theoretical approximation of what Claimant could ideally expect to earn, so time lost due to strikes, personal business, illness or

other reasons is not deducted from the computation. See Duncan v. Washington Metropolitan Area Transit Authority, 24 BRBS 133, 136 (1990); O'Connor v. Jeffboat, Inc., 8 BRBS 290, 292 (1978).

"Substantially the whole of the year" refers to the nature of Claimant's employment, whether it is intermittent or permanent, and presupposes that he could have actually earned wages during all 260 days of the year. Eleazar v. General Dynamics Corp., 7 BRBS 75, 79 (1977). A substantial part of the year may be composed of work for two different employers where the skills used in the two jobs are highly comparable. Hole v. Miami Shipyards Corp., 12 BRBS 38, 43 (1980), rev'd and remanded on other grounds, 640 F.2d 769 (5th Cir. 1981). The Board has held that 34.4 weeks of wages constitutes "substantially the whole of the year," but 33 weeks is not a substantial part of the year. Duncan, 24 BRBS at 136; Lozupone v. Stephano Lozupone and Sons, 12 BRBS 148, 156 (1979) (citing Orkney v. General Dynamics Corp., 8 BRBS 543 (1978)). If Claimant did not work for "substantially the whole of such year" in such employment, then the Court may compute his average weekly wage under Section 10(b). 33 U.S.C. § 910(b).

Whenever Sections 10(a) and (b) cannot "reasonably and fairly be applied," the Court has broad discretion in computing the average weekly wage pursuant to Section 10(c). Bonner v. National Steel and Shipbuilding Company, 5 BRBS 290, 293 (1977) (citing Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976)). The Court's primary concern must be to determine a sum that will "reasonably represent the...earning capacity of the injured employee." In accordance with Section 10(d), the sum is then divided by 52 to determine the average weekly wage of the injured employee. Id.

Employer argues that Claimant worked as a welder for "substantially the whole of the year immediately preceding [his] injury," so the Court should calculate Claimant's average weekly wage pursuant to Section 10(a). It asserts that Claimant's actual earnings should provide the basis for determining the average weekly wage. Moreover, it argues that Claimant should be considered a five day worker for purposes of determining average weekly wage despite the fact that Claimant worked in its employ for approximately seven and a half weeks as a six day worker.

As stated, Claimant worked as a welder and iron worker in Moscow for approximately seven and a half weeks prior to his injury. (Tr. at 32, 54.) For the remainder of the year preceding his injury, Claimant worked in the same type of employment for Rocky Mountain Steel Erectors. (Tr. at 26.) In his former employment, Claimant received six months of temporary total disability for a separate work-related injury. (Ex. A-93, Ex. B.) The Court must include that time in determining whether Claimant worked in the same employment for "substantially the whole of the year." See Duncan v. Washington Metropolitan Area Transit Authority, 24 BRBS 133, 136 (1990); O'Connor v. Jeffboat, Inc., 8 BRBS 290, 292 (1978). Based on the foregoing information, the Court finds that Claimant worked as a welder and iron worker for "substantially the whole of the year preceding the injury." 33 U.S.C. § 910(a).

However, the Court cannot apply Section 10(a) in this case because its application would produce unreasonable and unfair results. See 33 U.S.C. § 910(c); Lozupone v. Lozupone & Sons, 12 BRBS 148, 156-57 (1979). By including the wages Claimant earned at Rocky Mountain in its computation, Employer minimizes the impact of Claimant's recent increase in earning capacity. It also diminishes Claimant's average weekly wage by discounting the fact that Claimant worked six days a week for approximately seven and a half weeks prior to his injury. By adopting Employer's method for computing average weekly wage, the Court would fail to make a fair approximation of Claimant's annual earning capacity.

Therefore, the Court must calculate Claimant's average weekly wage pursuant to Section 10(c).[2] In making its determination, the Court notes that "[t]he essential purpose of the average weekly wage determination is to reflect 'a claimant's annual earning capacity at the time of the injury.'" Hall v. Consolidated Employment Systems, 139 F.3d 1025 (5th Cir. 1998) (citing Empire United Stevedores v. Gatlin, 936 F.2d 819, 823 (5th Cir. 1991) (emphasis added)); see also Hayes v. P & M Crane Co., 23 BRBS 389, 393 (1990), vac'd in part on other grounds, 24 BRBS 116 (CRT) (5th Cir. 1991). The Court is not limited to considering Claimant's earnings in the year preceding the injury. New Thoughts

[2]Section 10(b) is also inapplicable in this case because Claimant worked as a welder for "substantially the whole of the year preceding his injury." See 33 U.S.C. § 910(a), (b).

Finishing Company v. Travelers Insurance Company, 118 F.3d 1028, 31 BRBS 51, 54 (CRT) (5th Cir. 1997). Typically, a claimant's wages at the time of injury will best reflect the [his] earning capacity. Hall, supra.

The Board has stated that Section 10(c) is the proper provision for calculating Claimant's average weekly wage when Claimant received an increase in salary shortly before his injury. Miranda v. Excavation Construction, 13 BRBS 882, 886 (1981). Claimant's actual earnings would not be the controlling factor where they reflect Claimant's earlier work at a lower paying job. Id. In this case, Claimant's average weekly wage should be based on the employment contract in effect at the time of his injury. Although Claimant worked for a number of weeks in the preceding year at lower pay, he received an increase in salary when he entered into Zachary Parsons Sundt's employ. The phrase "earning capacity" connotes Claimant's potential to earn and is not restricted to a determination based on previous actual earnings. Bonner, supra (emphasis in the original). Therefore, Claimant's employment contract provides the most accurate basis for establishing Claimant's annual earning capacity at the time of his injury.

Claimant argues that vacation and holiday leave should also be included in the determination of his average weekly wage.[3] According to Section 2(13) of the Act, wages include "the reasonable value of any advantage which is received from the employer...." 33 U.S.C. § 902(13) (emphasis added). In this case, Claimant testified that he did not receive any money from Employer for vacation or holiday leave. (Tr. at 44-45.) According to Claimant's contract for employment, he was only eligible to take vacation after the successful completion of twelve months of employment. (Cx. 4-12.) Moreover, he was not entitled to take rest and recreation leave until he successfully completed four months of employment. Id. Prior to his injury, Claimant worked for only seven and a half weeks and, at the time of the injury, he was not entitled to any vacation or holiday leave. Therefore, his vacation and

[3]Although Employer argued that housing and meals it provided for Claimant in Moscow and the union contributions it made on behalf of Claimant should not be included in the determination of Claimant's average weekly wage, Claimant did not argue that those items should be included in the computation of average weekly wage. Therefore, the Court will not address the issue in this opinion.

holiday leave should not be included in the computation of his average weekly wage. See generally Johnson v. Newport News Shipbuilding and Dry Dock Company, 25 BRBS 340 (1992). Thus, the Court finds that Claimant's average weekly wage is based on a pay rate of $20.40/hour for 60 hours per week. This calculation gives rise to an average weekly wage of $1,224.00, and a corresponding compensation rate of $816.00.

Order

It is hereby ORDERED that:

1. Claimant, Jose Gallegos, has an average weekly wage of $1,224.00. Employer, Zachary Parsons Sundt, shall compensate Claimant for temporary total disability at a rate of $816.00.

2. Employer shall receive credit for all compensation that has been paid in accordance with the findings above.

3. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).

4. All computations are subject to verification by the District Director.

5. Claimant's attorney, within twenty (20) days of the receipt of this Order, shall submit a fully-supported fee application, a copy of which shall be sent to opposing counsel, who then shall have ten (10) days to respond with objections thereto.

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RICHARD K. MALAMPHY

Administrative Law Judge

RKM/kap
Newport News, Virginia